

DECISION

Lunter

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-209541.2

DATE: May 23, 1983

MATTER OF: Vibra-Tech Engineers Incorporated

DIGEST:

1. GAO finds that the protester was not prejudiced by statements of chairman of the agency's technical evaluation committee concerning the protester's integrity. The protester's average technical point score would have increased only slightly had the chairman scored the protester the same as the other evaluators did under responsibility and past performance, the solicitation's least important technical evaluation criteria.
2. GAO finds no evidence to indicate that the agency's evaluation of technical proposals of the protester and the awardee was inconsistent. The contracting agency found the awardee's revised proposal, which eliminated unnecessary features contained in the awardee's original proposal, to have the most direct approach to what was required by the solicitation. On the other hand, the agency found that certain of the protester's technical features were nonessential or beyond the solicitation's minimum requirements. GAO also finds that the contracting agency advised the protester during discussions that the protester's level of effort was overstated.
3. In negotiated procurements, procurement officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Cost/technical tradeoffs are governed only by tests of rationality and consistency with established evaluation factors. While the protester's technical

025656

proposal was point rated higher than the awardee's technical proposal, GAO finds no basis to object to the agency's determination that the proposals were technically equal, thus making cost the controlling award factor under the terms of the solicitation.

4. Once offerors are informed of the criteria against which their proposals will be evaluated, the contracting agency must adhere to those criteria or inform all offerors of any significant changes made in the evaluation scheme. GAO finds, however, that the contracting agency did not deviate from the solicitation's stated evaluation criteria in evaluating the offerors' proposals.
5. While the contracting agency's position concerning the technical equivalency of proposals contradicts the position taken by the agency in an earlier protest filed by the awardee, GAO finds that the written reports of the agency's technical evaluation committee, prepared before the awardee's protest, reveal that the eventual awardee was the agency's considered choice for award.
6. All members of technical evaluation board need not rescore the revised proposals submitted by the offerors except where there is a question of bias involved. GAO finds no indication of bias in the instant protest.
7. There is no requirement in the procurement regulations for the contracting agency to provide notice to a contractor of the agency's intent to terminate for the convenience of the Government prior to the actual termination itself. As to the agency's termination of the protester's contract before the protester had an opportunity to comment on the awardee's protest, GAO finds no bar to an agency taking such corrective action as it deems appropriate upon acknowledgment of the validity of the awardee's protest.

Vibra-Tech Engineers Incorporated (Vibra-Tech) protests the award of a contract to STS Consultants, Ltd. (STS), under request for proposals (RFP) No. HO222009 issued by the Department of the Interior. The RFP called for a research and development effort to evaluate and gather data on geologic and soil conditions which create abnormal and severe vibrations from blasting operations.

Subsequent to filing this protest, Vibra-Tech brought suit in the United States District Court for the District of Colorado (Civil Action No. 83-C-186). The court has issued a stop work order on the contract awarded to STS and requested that GAO issue an opinion on the issues raised by Vibra-Tech in order to aid the court in rendering its decision.

Vibra-Tech raises the following grounds of protest:

- (1) The personal bias of the chairman of Interior's technical evaluation committee resulted in unfounded allegations that Vibra-Tech lacked integrity which, in turn, resulted in a lower technical score for Vibra-Tech;
- (2) Interior upgraded STS's technical proposal for eliminating certain features with the net effect of illegally narrowing the technical point scores to Vibra-Tech's prejudice;
- (3) Interior's conclusion that the technical proposals of Vibra-Tech and STS are "technically equivalent" has no basis in law or fact and ignores Vibra-Tech's significantly higher technical scores;
- (4) STS's final proposal was technically insufficient because it failed to meet the technical requirements set forth in the RFP's statement of work;

(5) Interior evaluated Vibra-Tech's offer primarily on the basis of cost considerations in violation of the RFP's award clause which stated that technical criteria were more significant than cost factors;

(6) Interior's present position of technical equivalency between the proposals of Vibra-Tech and STS directly contradicts Interior's position in an earlier protest by STS that Vibra-Tech's proposal was technically superior;

(7) Interior's technical evaluation committee improperly acted on the basis of the technical scores of one of its members who evaluated the initial technical proposals but who did not evaluate the revised technical proposals; and,

(8) Interior failed to comply with minimum due process requirements in failing prior to termination to provide Vibra-Tech with notice of the reasons for terminating its contract.

For the reasons set forth below, we find no merit in the protest.

Background

Thirteen offers were received in response to the RFP. The offerors' technical proposals were evaluated in accordance with the following criteria listed in descending order of importance in the RFP:

(1) Understanding all elements of the Statement of Work and demonstrating that understanding by the thoroughness, soundness, and comprehension of the approach contained in the technical proposal.

(2) Qualifications and commitment of personnel, facilities, and overall capabilities of the proposer for the work to be accomplished.

(3) Quantitative comprehension of the work to be accomplished as evidenced by the proposed level of effort and management plan.

(4) Experience and background in blasting and vibrations.

(5) Responsibility and past performance in similar programs.

The RFP stated that evaluation criteria 2, 3 and 4 were considered to be of equal importance and would receive equal consideration in evaluation.

Following evaluation of offers, five firms, including STS and Vibra-Tech, were determined to be in the competitive range. Initial technical discussions were conducted with each of the companies and the offerors were given the opportunity to submit revised proposals. After revised proposals, the agency telephonically conducted final technical and cost negotiations with the five companies. Following final evaluation, STS received 700 points with a proposed cost of \$190,197. Vibra-Tech scored 865 points at a cost of \$278,468.

Immediately after final evaluations were completed, the chairman of Interior's technical evaluation committee recommended that a contract be awarded to STS because STS's proposal offered the greatest value to the Government. A draft contract was sent to STS for the company's signature. However, before the contract was returned by STS, Interior's regional counsel advised the contracting officer that an award to STS could not be approved because the technical point difference between STS's technical proposal and the higher scored Vibra-Tech proposal was 165 points out of a possible 1,000 points. In the opinion of the counsel, such a point spread between the two proposals did not indicate that they were technically equal and without a finding of technical equality, an award to STS could not be made on the basis of that firm's lower proposed cost.

Interior then awarded a contract to Vibra-Tech at an estimated cost-plus-fixed fee of \$278,468. Upon receiving notification of the award to Vibra-Tech, STS filed a protest with our Office alleging that it was unlawful for Interior to award to another company a contract already offered to STS and that the RFP required the agency to make the contract award to STS--the offeror having the offer deemed by Interior's technical evaluation committee as being the "most advantageous to the Government" considering both technical and cost.

As a result of the STS protest, Interior reviewed the entire selection process which led to the award to Vibra-Tech and concluded that the selection of Vibra-Tech was the result of a misunderstanding of the meaning and significance

of the technical point scores given by the technical evaluation committee. This conclusion was, in turn, based on Interior's finding that Vibra-Tech's technical proposal exceeded the requirements of the RFP's Statement of Work and that STS's technical proposal would achieve exactly what was required by the RFP. Having concluded that STS was actually the proper firm to receive the contract award, Interior terminated for the convenience of the Government, the contract it had awarded to Vibra-Tech and awarded the contract to STS at an estimated cost-plus-fixed fee of \$190,197. After receiving the award, STS withdrew its protest.

Following the notification from Interior that its contract was terminated and of the award to STS, Vibra-Tech timely protested to our Office.

Bias in Evaluation

Vibra-Tech contends that the adverse findings regarding integrity by the chairman of the technical evaluation committee improperly reduced Vibra-Tech's technical score by approximately 80 points. The chairman felt that Vibra-Tech had in the past performed work of "questionable quality" and thus had demonstrated "questionable integrity." According to Vibra-Tech, none of the other members of the technical evaluation committee had any problems with Vibra-Tech's integrity. In Vibra-Tech's opinion, the chairman's criticism of the company's integrity was completely unfounded and was based purely on the chairman's personal bias against one of the senior officers in Vibra-Tech.

Vibra-Tech's argument concerning the significance of the comments of the chairman regarding Vibra-Tech's integrity is essentially that the comments have "inevitably tainted" the contracting officer's conclusion regarding the technical merit of Vibra-Tech's proposal. We disagree. The record shows that the chairman did score Vibra-Tech's technical proposal 100 points lower than the other three evaluators. However, some of the 100-point difference was the chairman's lower technical score under the category of understanding all elements of the Statement of Work, a matter unrelated to Vibra-Tech's corporate integrity. Moreover, the record shows that Vibra-Tech's average technical score was 853 points which was near the highest technical score of 890 points given by one of the evaluators. Finally, the record reveals that the chairman subsequently revised his scoring of Vibra-Tech's proposal and increased

the company's final technical score by 50 points. Vibra-Tech's final average technical score increased to 865 points. Therefore, while Vibra-Tech's average technical score could have increased slightly had the chairman scored the company the same as the other evaluators in the area of responsibility and past performance, the least important of the technical evaluation criteria, we do not find that Vibra-Tech was prejudiced by the chairman's technical scoring.

Inconsistent Technical Evaluation

Vibra-Tech asserts that Interior's technical evaluators did not change their technical scores for STS's revised technical proposal despite the fact that STS made significant technical deletions from its initial proposal. Vibra-Tech further asserts that the technical evaluation committee chairman actually increased STS's original technical score because of these technical deletions. Consequently, Vibra-Tech contends that the difference in technical scores between its proposal and STS's proposal was improperly narrowed because of this inconsistency in the agency's evaluation of the proposals.

From our review of the record, we find no evidence of inconsistency in Interior's evaluation of the technical proposals of Vibra-Tech and STS. The record shows that Interior's technical evaluation committee evaluated STS's initial technical proposal as acceptable with a "very good discussion of the procedures to be followed" and a "very good understanding of the instrumentation" involved in blast vibration measurement. However, the committee did note that while the subsurface geology program was good, it was more comprehensive than what was desired by the agency. Also, STS's instrumentation and program for blast vibration measurement was determined to have "unnecessary components." Overall, the committee concluded that because of many unnecessary items in STS's technical plan and because of unneeded personnel proposed by STS, STS's proposed costs were too high. Nevertheless, in view of the possibility that the unnecessary technical items and the unnecessary personnel could be eliminated, the committee felt that STS's costs could be reduced to a "competitive level."

The record shows that STS's revised technical proposal contained a great many changes which significantly influenced its proposed costs. Interior's technical evaluation committee found most of STS's technical changes to be

"appropriate" including much of the company's ground and source characterization. However, STS's proposed revisions included the omission of "single-hole shots." Since single-hole blast sources were part of the RFP's Statement of Work as a form of site calibration, the committee determined that single-hole shots had to be included again in STS's proposal in order for the company to remain technically acceptable.

Following the evaluation of its revised proposal, STS submitted an addendum that it would again include single-shot vibration measurements in its proposal. In the final evaluation of STS's technical proposal, Interior's technical evaluation committee concluded STS had provided the agency with a "lean and direct approach to precisely what is requested in the RFP."

Interior's technical evaluation committee found Vibra-Tech's initial technical proposal to be acceptable containing a well thought out field and analysis program. Like STS's proposal, however, the committee concluded that Vibra-Tech's level of effort was "somewhat overstated" and that some proposal items could be deleted as being in excess of the RFP's Statement of Work. In particular, the committee found that Vibra-Tech's blasting measurement program included items which could be eliminated, such as borehole strain gauges and probes for evaluating explosive performance. In addition, the committee felt that while Vibra-Tech's blast source characterization was a definite evaluation plus, it went beyond the RFP's Statement of Work and contributed to Vibra-Tech's somewhat excessive effort, especially with regard to Vibra-Tech's proposed high-speed photography.

Vibra-Tech alleges, however, that Interior did not adequately communicate to it the committee findings that certain of its technical features were nonessential or beyond the RFP's minimum requirements. The record reveals that Interior conducted in-depth technical discussions concerning the specific proposal deficiencies noted by the evaluation committee. In this regard, Interior states that during the discussions, the committee's initial report was used by the agency to monitor the discussion with each offeror and to insure that each comment of the committee was discussed. Moreover, Interior emphasizes that Vibra-Tech was advised during discussions that their level of effort was overstated--especially the company's blast source characterizations.

We do note, nevertheless, that Interior admits that the members of its technical evaluation committee apparently assigned technical points for each portion of Vibra-Tech's proposal even if that portion exceeded the requirements of the RFP's Statement of Work. According to Interior, this was improper in light of the RFP's warning that offerors should not include in their technical or cost proposals, elements which are beyond the Scope of Work. Thus, Interior takes the position that the point scores, themselves, do not reflect the true technical judgment of its evaluation committee regarding the proposals of STS and Vibra-Tech.

Technical Equivalency

Vibra-Tech contends that the technical scores given to its proposal and STS's proposal show that the two companies' proposals were never technically equal nor were they considered as such by either Interior's technical evaluation committee or the contracting officer. Vibra-Tech alleges that Interior's finding of technical equivalency was developed by the agency only as an after-the-fact rationalization of a desire or decision to award a contract to STS. Vibra-Tech further alleges that no agency scoresheet or technical evaluation report compiled by the evaluation committee makes any mention that the proposals of STS and Vibra-Tech were technically equal. According to Vibra-Tech, it was not until after the committee's final written report that Interior realized that an award to STS had to be based on a finding that STS's technical proposal was "equal" to Vibra-Tech's.

Interior argues that the Government is not bound to award a contract to an offeror with the highest technical score when the higher scored proposal offered to the Government has no greater advantage than the awardee's proposal. The agency further argues that technical point scores alone are not determinative of the question of whether two proposals are substantially equal. In this regard, Interior states that the technical proposals of STS and Vibra-Tech were ranked high--both having offered to do the job requested by the RFP's Statement of Work. Interior points out that the great amount of effort Vibra-Tech placed on blast source characterization, while probably worthwhile, was not essential to the project so as to justify the additional cost of an award to Vibra-Tech.

Therefore, while Vibra-Tech scored higher technically, these additional points were due to Vibra-Tech offering more

than was required by the RFP and, in Interior's view, both were technically equal concerning performance of the Statement of Work.

We think that Vibra-Tech has overemphasized the significance of the difference in technical point scores between its proposal and STS's proposal. We have recognized that in negotiated procurements, procurement officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with established evaluation factors. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. Thus, we have upheld awards to lower priced, lower scored offerors where it was determined that the cost premium involved in making an award to a higher rated, higher priced offeror was not justified in light of the acceptable level of technical competence available at the lower cost. Grey Advertising, Inc., supra. As we stated in 52 Comp. Gen. 358, at 365 (1972), the determining element is not the difference in technical merit per se, but the considered judgment of the procuring agency concerning the significance of the difference. On the other hand, we have also upheld awards to higher rated offerors with significantly higher proposed costs because it was determined that the cost premium involved was justified considering the significant technical superiority of the selected offeror's proposal. Riggins & Williamson Machine Company, Incorporated, et al., 54 Comp. Gen. 783 (1975), 75-1 CPD 783. In any event, while we recognize that Vibra-Tech's technical proposal was point-rated higher than STS's proposal, the question of whether a given point spread between two competing proposals indicates a significant superiority of one over the other depends on the facts and circumstances of each procurement. Wheeler Industries, Inc., B-193883, July 20, 1979, 79-2 CPD 41.

Furthermore, where the agency's procurement officials have made a cost/technical tradeoff, the issue for our consideration is whether the agency's determination to make an award to a particular contractor was reasonable in light of the RFP's evaluation scheme. Hager, Sharp & Abramson, Inc., B-201368, May 8, 1981, 81-1 CPD 365.

Here, Interior's technical evaluation committee found that both STS and Vibra-Tech would be able to perform acceptably. The committee recommended award to STS as the lower priced offeror because it considered Vibra-Tech's effort on the source of the blast to be unnecessary in view

of the RFP's emphasis on the blast's propagating and receiving medium. In this regard, we note that the RFP's Statement of Work specifically stated that one of the remaining problems in the propagation of blast vibration was the "determination of geological conditions which favor the transmission of low-frequency ground vibrations, and possibly even their generation. The RFP's Statement of Work further stated that at distances beyond a few thousand feet, the geology, soil types, and subsurface structure strongly determine the blast's vibrational characteristics.

Where an agency regards proposals as essentially equal technically, cost or price may become the determinative consideration in making an award notwithstanding the fact that in the overall evaluation scheme, cost was of less importance than other evaluation criteria. See Computer Data Systems, Inc., B-187892, June 2, 1977, 77-1 CPD 384. In fact, the RFP's Evaluation and Award Factors clause recognized that cost might be the deciding factor where the proposals were ranked technically equal. Also, the designation in a solicitation of cost or price as a subsidiary evaluation factor means only that, where there is a technical advantage associated with one proposal, that proposal may not be rejected merely because it is higher in price. Computer Data Systems, Inc., supra. It does not mean that when technical proposals are deemed to be essentially equal, price or cost will not become the controlling factor. See Analytic Systems, Incorporated, B-179259, February 14, 1974, 74-1 CPD 71. Indeed, cost cannot be ignored by an agency in any contract selection process. Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168.

As to Vibra-Tech's allegations that Interior's finding of technical equality was done after the fact, we find that such allegations are not supported by the record. The technical evaluation committee's report on the revised proposals stated that the first choice, overall, for award was STS. The committee also stated that Vibra-Tech's high score should also be considered provided the company could find sufficient cost reductions to approach STS's proposed costs. While there is no specific finding of technical equality in the report, we think that such a finding is implied from the overall language of the report. In addition, we find that the final report of the committee indicated that STS's technical proposal would provide what was requested by the RFP just as well as Vibra-Tech's top scored technical proposal.

Technical Acceptability of the STS Proposal

Vibra-Tech alleges that STS's technical proposal was insufficient because it failed to propose any control or measurement of the blast sequence and because it failed to develop blast design criteria that would minimize the potential for structural damage and excess vibration response. Vibra-Tech alleges that STS instead stated in its technical proposal that it was "not going to make a research project of the blast design." Vibra-Tech goes on to argue that STS made the above statement despite the fact that the RFP indicated in several places that blast design criteria was needed by industry. Thus, Vibra-Tech contends that STS failed to acknowledge the Government's requirement for blast design which, in turn, adversely reflected on STS's understanding of the scope of the project, the most important technical evaluation factor.

Vibra-Tech asserts that, in contrast, it proposed a comprehensive source control to precisely detonate explosives with a programmable sequential blasting machine, highly accurate seismic blast initiators, and high speed cinematography to confirm the precise firing time of each explosive charge in a series. Vibra-Tech charges that in this way, the remaining variables reflect only geologic factors, the study of which Vibra-Tech points out is the object of the RFP. According to Vibra-Tech, geologic factors cannot be "controlled" so that the only approach to efficient blast design is to control the blast itself.

Vibra-Tech argues that STS failed to meet the RFP's major evaluation criteria in several other aspects. First, Vibra-Tech alleges that STS proposed to devote only 4,826 hours to the research over 26 months despite the fact that Interior required completion of the project in 24 months. Second, Vibra-Tech alleges that STS does not have a vibration engineering capability and relies on a part-time consultant. Finally, Vibra-Tech alleges that, overall, STS offered only a "minimal effort" whereas Vibra-Tech proposed to perform significantly more work, including source control blast design and extensive digital computer analysis.

In response, Interior states that Vibra-Tech's allegations concerning the technical sufficiency of STS's proposal are contrary to the written evaluations made by its technical evaluation committee.

The determination of the relative merits of a proposal, particularly with respect to technical considerations, is

primarily a matter of administrative discretion. Dynamic Science, Inc., B-188472, July 20, 1977, 77-2 CPD 39. Our function is not to evaluate proposals submitted and make our own determination as to their relative merits. Houston Films, Inc. (Reconsideration), B-184402, June 16, 1976, 76-1 CPD 380. That function is the responsibility of the contracting agency which must bear the burden of any difficulties resulting from a defective evaluation. Macmillan Oil Company, B-189725, January 17, 1978, 78-1 CPD 37. In light of this, we have repeatedly held that procuring officials enjoy a reasonable degree of discretion in evaluation of proposals and that this will not be disturbed unless shown to be arbitrary or in violation of the procurement laws and regulations. Piasecki Aircraft Corporation, B-190178, July 6, 1978, 78-2 CPD 10.

Additionally, the protester has the burden of affirmatively proving its case. C. L. Systems, Inc., B-197123, June 30, 1980, 80-1 CPD 448. The fact that the protester does not agree with the agency's technical evaluations does not in itself render the evaluations unreasonable. Kaman Sciences Corporation, B-190143, February 10, 1978, 78-1 CPD 117.

From our review of the record, we find that Interior's evaluation of STS's technical proposal was reasonable. With regard to Vibra-Tech's complaint that STS's technical proposal devoted almost no effort to the control of the blast source, we dispute Vibra-Tech's assertion that the only approach to efficient blast design is to control the blast itself. As noted above, the RFP's Statement of Work made it clear that the emphasis was to be on the geological conditions which favor the transmission of low frequency ground vibrations. In this regard, the final report of Interior's technical evaluation committee shows that a "definite plus" for STS's proposal was the location of two additional candidate sites for blasting. In view of the fact that Interior was primarily interested in how various field conditions affect the transmission of blast vibration, we see no basis for Vibra-Tech's argument that STS's proposal was inadequate because it did not devote the effort to controlling the source of the blast that Vibra-Tech's proposal did.

With regard to Vibra-Tech's allegation that STS's technical proposal offered only a minimal effort, this allegation contradicts the final determination of Interior's technical evaluation committee that STS's proposal represented a

lean and direct approach to precisely what was requested by the RFP. Second, the 24-month period for completion of work referenced by Vibra-Tech was not a definite requirement. Rather, the RFP stated that it was contemplated that all work, including the submission of an approved final report, would be completed within 24 months. Offerors were cautioned to indicate in their proposals if they could complete the proposed work in more or less than 24 months without additional costs. Finally, with respect to Vibra-Tech's assertion that STS does not have vibration engineering capability, the record shows that Interior's technical evaluation committee specifically noted that STS had "a long history of involvement with the industry in blasting and vibration."

Changed Evaluation Criteria

Vibra-Tech contends that the Government evaluated the proposals based on criteria not set out in the RFP. Vibra-Tech emphasizes that the RFP's evaluation criteria made the technical features of the offerors' proposals of paramount importance with cost being a minor consideration when two proposals were found to be technically equal. Vibra-Tech argues that despite the importance of technical considerations in the RFP, Interior, from the beginning of the procurement, attached a far greater importance to proposed costs. Vibra-Tech further argues that not only did the agency allow proposed costs to become the dominant evaluation factor, its technical evaluation committee focused primarily on the offerors' costs when considering the technical merit of the technical proposals. Vibra-Tech asserts, therefore, that the consideration of cost became inextricably bound as an equal or superior evaluation factor in the technical recommendation of Interior's technical evaluation committee which, in turn, "tainted" the technical scores in favor of STS and against Vibra-Tech.

Interior argues that its procurement officials did not deviate from the evaluation criteria published in the RFP. According to the agency, Vibra-Tech's technical proposal contained blasting and measurement items which could be eliminated and blasting source characterizations that went beyond the RFP's Statement of Work. Interior states that because Vibra-Tech's technical approach exceeded the RFP's minimum needs, its procurement officials concluded that the difference in technical point scores which had been awarded to Vibra-Tech and STS was more apparent than real. Consequently, Interior takes the position that it was proper under these circumstances to use cost as a determining award factor within the meaning of the RFP's evaluation criteria.

While procuring agencies have broad discretion in determining the evaluation plan they will use, they do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation. See Umpqua Research Company, B-199014, April 3, 1981, 81-1 CPD 254. Once offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria or inform all offerors of any significant changes made in the evaluation scheme. Telecommunications Management Corporation, 57 Comp. Gen 251 (1978), 78-1 CPD 80; Eastman Kodak Company, B-194584, August 9, 1979, 79-2 CPD 105. Consequently, it is improper for an agency to depart in any material way from the evaluation plan described in the solicitation without informing the offerors and giving them an opportunity to structure their proposals with the new evaluation scheme in mind. Umpqua Research Company, supra.

We agree with Interior, however, that the agency's procurement officials did not deviate from the RFP's evaluation criteria. With respect to Vibra-Tech's assertion that cost was a minor consideration, the RFP's Evaluation and Award Factors clause provided:

"Award will be made to that responsible offeror whose offer, conforming to this Request for Proposals, is most advantageous to the Government considering the criteria listed above, cost and other factors. An offeror's proposal may not be considered when his cost is unreasonably high or unrealistically low. Furthermore, cost may be the deciding factor when proposals are ranked technically equal. Since the technical criteria are considered of greater importance, the Government reserves the right to award a contract to other than the low offeror."

From the above-quoted language, it is clear that cost was more than just a minor consideration in determining which offeror received the award. Further, while it is clear that cost was subsidiary to technical factors in the agency's evaluation for award, this meant only that the agency would not reject a technical advantageous proposal merely because of its higher price. Since Interior found the proposals of Vibra-Tech and STS essentially equal technically to perform the Statement of Work, cost properly became the deciding factor for award, consistent with the terms of the RFP.

With respect to Vibra-Tech's allegation that Interior improperly focused on the offerors' cost when considering the technical merit of the offerors' technical proposals, Vibra-Tech refers to several statements in the deposition of Interior's Technical Evaluation Committee Chairman which it claims shows that the committee felt pressure to take cost considerations into account when making technical evaluations. We find that these statements, at most, reveal that Interior tended in past procurements to award contracts to technically acceptable offerors having the lowest proposed costs. In our opinion, the statements do not show that cost considerations in any way affected technical evaluation point scores, and we also find nothing in the record to support this allegation of the protester.

Interior's Position in STS's Protest

Vibra-Tech contends that the finding of technical equality by Interior's procurement officials is refuted by the statements made by the agency in the report submitted in response to STS's protest with our Office. Vibra-Tech charges that in this report, the question was raised as to whether Vibra-Tech's proposal contained "frills" which went beyond the RFP's Statement of Work, and the agency determined that Vibra-Tech's proposal had been properly scored and had properly received a superior technical score based on the RFP's evaluation criteria. Vibra-Tech also charges that the report shows that the agency concluded after a thorough review of the companies' proposals that there was "no rational basis for a determination that the proposals were technically equal thereby making price a tie-breaker." Thus, in Vibra-Tech's opinion, Interior's report on STS's protest leaves little doubt regarding the technical superiority of Vibra-Tech's proposal.

Interior states that the entire selection process which led to the award to Vibra-Tech was given further review after STS filed its protest with our Office. Interior states that as a result of this review, it found that the procurement selection procedures were "valid" but that each member of the technical evaluation committee had indicated that Vibra-Tech's proposal exceeded the requirements of the RFP's Statement of Work and that STS's proposal would achieve exactly what was required. Based upon this information, Interior found that the actual technical point scores were not representative of the true technical merit of STS's and Vibra-Tech's proposals and that the proposals were, in fact, essentially equal technically. Interior declares, therefore, that STS was the proper firm to receive the contract award.

025654

In response, Vibra-Tech alleges that no new facts or other information were obtained by Interior from the members of the technical evaluation committee. In support of this allegation, Vibra-Tech cites portions of depositions taken of the members of the committee which, according to Vibra-Tech, show that none of the members were ever contacted after STS's protest concerning the point scores that had been given to STS's and Vibra-Tech's proposals. Since the depositions show that Interior had no new information at the time, Vibra-Tech takes the position that there was no rational basis for Interior's changing its original conclusion that Vibra-Tech had the superior technical proposal.

The agency report, referred to above by Vibra-Tech was never furnished to our Office by Interior. Rather, STS withdrew its protest before we received the agency's report. The report was furnished to us by Vibra-Tech as part of its comments in the instant protest. In any event, while we agree with Vibra-Tech that the report specifically states that Vibra-Tech's technical proposal had received the superior technical point score, the written reports of Interior's technical evaluation committee, prepared before STS filed its protest, show that STS was the considered choice for award based on both technical scores and costs. The agency report referred to by Vibra-Tech also contains the following analysis of Vibra-Tech's technical proposal:

"Serious consideration was given to the Vibra-Tech Engineering proposal, as top scorer. However, the great amount of effort on source and site characterization by this firm, and also Geomechanics is interesting and probably worthwhile but not essential to the project. As most environmental problems in blasting involve far-field conditions, most of the effort should be directed toward the propagating and receiving medium, not the source area. The additional work proposed by Vibra-Tech simply isn't worth the difference."

- - Technical Evaluators - -

Vibra-Tech objects to the fact that one of the members of the evaluation committee who had evaluated and scored the initial technical proposals submitted in response to the RFP took no part in the evaluation of the revised technical proposals. Vibra-Tech refers to the deposition of this

individual in which he indicates that he would have revised STS's technical score downward had he scored STS's revised technical proposal which contained a great many changes from the company's original technical proposal. However, we do not think this is enough to show that Vibra-Tech was unfairly treated in the evaluation process, especially since there is no indication in the record what the evaluator would have given STS had he actually conducted a detailed evaluation of STS's revised technical proposal. Moreover, except where the question of bias is involved, we have held that all of a technical evaluation board members need not rescore the revised proposals submitted by the offerors. See Columbia Research Corporation, B-193154, May 15, 1979, 79-1 CPD 353.

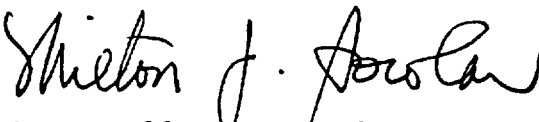
Due Process

Vibra-Tech asserts that Interior deprived Vibra-Tech of its due process rights by misleading Vibra-Tech of its true intentions by concealing a plan to terminate Vibra-Tech's contract without notice and by denying Vibra-Tech an opportunity to respond to STS's protest prior to Interior's termination of Vibra-Tech's contract. Vibra-Tech alleges that following STS's protest, Interior notified Vibra-Tech that it would have an opportunity to comment on the protest in accordance with established procedures. Vibra-Tech further alleges that not only did Interior terminate Vibra-Tech's contract before resolution of STS's protest, it had planned 1 month prior to the actual termination to so terminate. Consequently, Vibra-Tech argues that by failing to provide the company with notice of the reasons for the termination of its contract and an opportunity to present evidence and argument in opposition, Interior failed to comply with the minimum due process requirements of the United States Constitution.

We are unaware of any provision in the Federal Procurement Regulations (FPR) which requires an agency to provide notice to a contractor of its intent to terminate for the convenience of the Government the contractor's contract prior to the actual termination itself. FPR § 1-8.202 (1964 ed.) merely requires that the contractor be notified of the termination when it is made. Further, any dispute concerning the propriety of the termination for convenience of the amount of the contractor's termination costs can be resolved with the contracting officer or ultimately Interior's Board of Contract Appeals. In this regard, we note that Interior states that it fully intends to negotiate an equitable settlement agreement with

Vibra-Tech as required by the FPR. As to Interior's terminating Vibra-Tech's contract before the company had an opportunity to comment on the STS protest, we see no bar to a contracting agency taking such corrective action as it deems appropriate, especially where, as here, it has acknowledged the validity of the protest. See International Business Machines Corporation, B-197188, October 21, 1980, 80-2 CPD 302.

In view thereof, it is our view that the protest is without merit.

for 
Comptroller General
of the United States